IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0277
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
STEVE ALLEN LYMAN,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20050552

Honorable Robert Duber, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and John L. Saccoman — Phoenix
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Steve Lyman was convicted after a jury trial of possession of a dangerous drug and possession of drug paraphernalia. He was sentenced to concurrent, presumptive terms of imprisonment: ten years for possessing methamphetamine and 3.5 years for possessing paraphernalia. On appeal, he argues the trial court erred in the admission of prejudicial evidence of his methamphetamine use and in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the drug-related charges.[1] Finding no error, we affirm.

¶2 We state the facts in the light most favorable to sustaining the convictions. *State v. Hampton*, 213 Ariz. 167, n.1, 140 P.3d 950, 954 n.1 (2006). While on patrol for the Miami Police Department, Officer Charles Schmidlin was driving behind a newer model Pontiac Grand Prix. As was his routine practice, he checked the license plate by contacting a police dispatch operator. The operator advised him the license belonged to a 1979 Chevrolet. Schmidlin initiated a traffic stop on the Grand Prix to investigate the discrepancy.

¶3 Schmidlin approached the driver of the car, whom he identified as Lyman, and was able to see the vehicle identification number through the windshield. Schmidlin called the dispatch operator with the number and was advised the car had been stolen from Phoenix. At that time, Schmidlin designated the stop as "high risk" because of the possible

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[1]Lyman was also charged with theft of a means of transportation, but the trial court granted his motion for judgment of acquittal on that count pursuant to Rule 20, Ariz. R. Crim. P.

felony in progress, and he called the Arizona Department of Public Safety (DPS) for backup assistance.

¶4 When two DPS officers arrived to assist Schmidlin, they ordered Lyman and his passenger out of the vehicle and placed them in different police vehicles. The officers searched the vehicle. They found in the pocket of the passenger side door a bag of popcorn that Schmidlin had earlier seen the passenger eating. Inside the bag of popcorn was a plastic bag of methamphetamine and a syringe. One of the officers noticed the driver's door panel was askew. Behind the panel and inside the door, he found a glass pipe, syringe, and a red plastic soft case containing another small bag of methamphetamine. At the police station, Lyman told Schmidlin he had used methamphetamine in the last six hours. Schmidlin also observed needle track marks on the inside of both Lyman's arms. Over Lyman's objections, his statement to Schmidlin about recent drug use and Schmidlin's observations about Lyman's arms were admitted at trial. Lyman was convicted of possession of methamphetamine and possession of paraphernalia. This appeal followed.

¶5 Lyman argues the trial court erred by admitting evidence of his drug use six hours before his arrest and needle marks on his arm at the time of his arrest. Specifically, Lyman contends, as he did in his motion in limine before the trial court, the evidence should have been excluded under Rule 404(b), Ariz. R. Evid., as improper evidence of another crime for which he was not indicted—use of a dangerous drug. "So long as the decision to admit the other-act evidence is supported by the facts before the court, the trial court's

decision will be affirmed on appeal unless a clear abuse of discretion appears." *State v. Connor*, 215 Ariz 553, ¶ 32, 161 P.3d 596, 606 (App. 2007).

¶6 Here, the trial court correctly admitted the other act evidence, *see id.*, because it was relevant for a permissible purpose under Rule 404(b) (permitting admission of other act evidence when relevant to "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). A jury could reasonably infer from the needle marks on Lyman's arm and his admission that he had injected methamphetamine six hours earlier, that he had a motive to possess both the syringe and the methamphetamine at the time of the stop. *See State v. Collins*, 111 Ariz. 303, 305, 528 P.2d 829, 831 (1974) (evidence of defendant's heroin addiction admissible to show motive of theft of heroin from shooting victim). Moreover, the jury could reasonably infer from the evidence that finding the drugs and paraphernalia in the door panel, next to where Lyman had been seated, was no mere accident or coincidence. *See State v. Stein*, 153 Ariz. 235, 239, 735 P.2d 845, 849 (App. 1987) (when defendant denied knowledge of methamphetamine found in home, evidence of his possession of heroin was admissible to show knowledge and intent to possess methamphetamine).

¶7 Lyman argues that even if the evidence was not precluded by Rule 404(b), it should have been excluded under Rule 403, Ariz. R. Evid., because it was unfairly prejudicial. When we review the trial court's ruling on the admissibility of evidence, "we must look at the evidence in the light most favorable to its proponent, maximizing its

probative value and minimizing its prejudicial effect." *State v. Kiper*, 181 Ariz. 62, 66, 887 P.2d 592, 596 (App. 1994). Relevant evidence may be admitted under this rule unless "its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403. But evidence prejudicial to the accused is not always unfairly so. *State v. Lee*, 189 Ariz. 590, 599-600, 944 P.2d 1204, 1213-14 (1997); *see also State v. Armstrong*, 176 Ariz. 470, 472-73, 862 P.2d 230, 232-33 (App. 1993) (finding evidence of defendant's prior drug transactions, although prejudicial to defendant, not unfairly so). Rather, unfair prejudice results when the evidence unduly tends "to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997).

¶8 Lyman does not articulate how the evidence was unfairly prejudicial. *See State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995); *Mott*, 187 Ariz. at 546, 931 P.2d at 1056. In fact, his own witness testified, without objection, that he was a former drug user. To the extent Lyman could have suffered any unfair prejudice from any improper inference of his character as a drug abuser, the evidence about his methamphetamine use six hours before his arrest and the officer's observations of the condition of his arms was cumulative to other evidence presented. *See State v. Beck*, 151 Ariz. 130, 133, 726 P.2d 227, 230 (App. 1986) (witness's testimony, even if prejudicial, was cumulative; therefore, any error in its admission was harmless). We find no abuse of discretion in the admission of the evidence.

¶9 Lyman next argues the trial court erred when it denied his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the drug-related charges. We will only reverse a conviction for insufficient evidence pursuant to Rule 20 if "there is a complete absence of probative facts to support a conviction." *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). To determine whether evidence is sufficient to support a conviction, we decide whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

¶10 Lyman's entire argument on the issue consists of two sentences: "The evidence presented at trial was clearly that the drugs and paraphernalia were in the vehicle door and the popcorn bag prior to [Lyman] entering the car. [Lyman] had no control over these items and thus, that the court erred in denying the Rule 20 motion." Essentially, he is contending the state presented insufficient evidence on the element of possession. *See* A.R.S. § 13-3407(A)(1) ("A person shall not knowingly . . . [p]ossess or use a dangerous drug."); § 13-3415(A) ("It is unlawful for any person to . . . possess . . . drug paraphernalia . . . ."); § 13-105(30) ("'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property.").

¶11 First, the jury was entitled to reject Lyman's version of events, a version based entirely on the testimony of the only defense witness, his girlfriend. *See State v. Pieck*, 111

Ariz. 318, 320, 529 P.2d 217, 219 (1974) ("The jury is not compelled to accept the story or believe the testimony of an interested party."); *see also State v. Hall*, 204 Ariz. 442, ¶ 55, 65 P.3d 90, 103 (2003) (credibility of witnesses is a jury matter); *State v. Dixon*, 216 Ariz. 18, ¶ 10, 162 P.3d 657, 660 (App. 2007) (rejecting argument that evidence was insufficient based on defendant's testimony, which was "subject to the jury's scrutiny for weight and credibility").

¶12 Second, although "the 'mere presence without more in an apartment or car of unobviously placed narcotics will not convict the owner or inhabitant of possession,'" the defendant's "dominion is a circumstance which, when considered with other evidence showing knowledge, is sufficient to sustain a conviction of knowledgeable possession." *State v. Gerry*, 15 Ariz. App. 441, 443, 489 P.2d 288, 290 (1971), *quoting State v. Harris*, 9 Ariz. App. 288, 290, 451 P.2d 646, 648 (1969). Here, Lyman, as the driver of a car, had dominion over the items within it. And, of the two occupants of the car, he was closest to the drugs found inside the driver's side door—indeed his body was immediately adjacent to that panel and would have obstructed his co-occupant's access to it. As discussed, he also admitted using methamphetamine hours before the arrest, and he had needle tracks on his arms. This was ample evidence from which the jury could have found that Lyman possessed, at the very least, the methamphetamine and the paraphernalia discovered in the driver's side door, if not that found in the popcorn bag. *See, e.g.*, *State v. Saiz*, 106 Ariz. 352, 353, 355, 476 P.2d 515, 516, 518 (1970) (fresh puncture marks in arm and defendant's proximity to

person found with drugs, *inter alia*, supported conviction for possession of heroin even though drugs not found on defendant); *State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980) (sufficient evidence of dominion and control over marijuana to support possession for sale charge when large quantity of drug was in back seat of car and defendant was driver of car).

¶13 We affirm.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge